(2)

No. 90-189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FRANK LANDRY, *et al.*,
Cross-Petitioners,
v.
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
TACA INTERNATIONAL AIRLINES, S.A., *et al.*,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF CROSS-RESPONDENTS AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND CHARLES J. HUTTINGER IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the court below properly concluded that plaintiffs' claim that their union breached its duty of fair representation and their employer breached the collective bargaining agreement through negotiation and entry into a new collective bargaining agreement one year before suit was filed was barred by the six-month statute of limitations established in *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983)?

LIST OF PARTIES TO THE PROCEEDINGS

The Air Line Pilots Association, International, AFL-CIO and Charles J. Huttinger were defendants in the district court, appellees in the court of appeals, and are petitioners and cross-respondents in this Court.

TACA International Airlines, S.A. was a defendant in the district court, an appellee in the court of appeals, and is a respondent and cross-respondent in this Court.

Fringe Benefit Administrators, Ltd. was a defendant in the district court, an intervenor in the court of appeals, and is a respondent and cross-respondent in this Court.

The plaintiffs in the district court, appellants in the court of appeals, and respondents and cross-petitioners in this Court, are: Frank Landry, Jules Corona, Charles South, Robert A. Massa, Don Johnson, T.Q. Howard, Joe Hass, Walter Keller, Don Jenkins, Emile Cerisier, and M. Letona. The following were plaintiffs in the district court but were not appellants in the court of appeals and are not respondents or cross-petitioners in this Court: Thomas Brignac, Robert Lukenbill, Bert Haffner, and Gary Zyriek.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 901 F.2d 404, and is reproduced at App. A.[1] The opinions of

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[1] "App. ——" refers to the appendix annexed to the petition for a writ of certiorari submitted by the Air Line Pilots Association, International and Charles J. Huttinger in this case (No. 89-1925). "R. ——" refers to the record on appeal.

the court of appeals on petitions for rehearing are reported at 901 F.2d 404, 437, and are reproduced at App. H and App. I. The unreported opinions of the United States District Court for the Eastern District of Louisiana are reproduced at App. C through App. E.

STATUTES INVOLVED

Set out in the attached appendix are the following provisions of the National Labor Relations Act ("NLRA"): 29 U.S.C. §§ 142(3) and 152(2), (3).

STATEMENT OF THE CASE

By this lawsuit, plaintiffs seek to set aside a collective bargaining agreement which they contend was unlawfully negotiated by their union, the Air Line Pilots Association, International ("ALPA"), in breach of its duty of fair representation ("DFR") and by their employer, TACA International Airlines, S.A. ("TACA"), in breach of the pre-existing collective bargaining agreement. The suit was not filed until one year after the challenged agreement was reached.

A. The Facts

The negotiations which are the subject of plaintiffs' suit began in October 1983, when TACA and ALPA sought to amend their existing collective bargaining agreement. Shortly thereafter, TACA attempted to relocate its pilot base to El Salvador, terminate the existing agreement, and withdraw its recognition of ALPA. App. A, 3a. On ALPA's motion, TACA's conduct was enjoined. *Id.* The Fifth Circuit affirmed, but held that TACA could "relocate its pilot base, and effect the other intended steps" provided that it did so in accordance with the bargaining requirements of the Railway Labor Act ("RLA"). *Air Line Pilots Ass'n, Int'l* v. *TACA Int'l Airlines, S.A.*, 748 F.2d 965, 972 (5th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985).

Negotiations continued in 1984 and 1985. With the assistance of the National Mediation Board, a July 24, 1985 "Pilots' Agreement" was reached under which, *inter alia*: ALPA would not oppose relocation of the pilot base to El Salvador after August 31, 1985; the TACA pilots could elect either to retain their positions with TACA at the relocated pilot base or accept a specified severance package; and TACA's funding of the TACA Pilots' Retirement Plan (the "Plan") would cease as of August 31, 1985, which, by the Plan's terms, would cause it to terminate. R.503-05. A December 17, 1985 "Settlement Agreement" resolved all disputes which had arisen under the Pilots' Agreement.

All of the plaintiffs who have joined in the cross-petition accepted and received the severance package.[2]

B. Proceedings Below

1. *District Court*

A year after the Pilots' Agreement was reached, 15 former TACA pilots (14 of whom had accepted the severance option and thereby received over $400,000, App. A, 5a; R.68, 576) filed a "hybrid" DFR/breach of contract claim against ALPA and TACA. Plaintiffs further alleged that TACA, ALPA and Fringe Benefit Adminis-

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[2] Virtually all of "The Facts" set forth at pp. 3-9 of the cross-petition ("cross-pet.") lack record support, and plaintiffs offer none. For example, plaintiffs' assertion that ALPA representative Huttinger "lost his status to negotiate, to vote, to represent the union," cross-pet., p. 5, was found by the court below to conflict with the uncontroverted evidence. App. A, 46a-47a. Plaintiffs' claim that it was only this Court's denial of certiorari in *ALPA v. TACA*, 748 F.2d 965, which prompted the execution of a written retirement plan in April 1985, cross-pet., p. 8, is spurious: certiorari was not denied until mid-May 1985. 471 U.S. 1100 (1985). Because these and numerous other factual misstatements do not "have a bearing on the question of what issues would properly be before the Court if certiorari were granted," Sup. Ct. R. 15.1, we refrain from burdening the Court with a line-by-line refutation of cross-petitioners' bald assertions.

trators, Ltd. ("FBA"), the Plan Administrator, violated ERISA by delaying implementation of the Plan, failing and refusing to disclose information about the Plan, and paying Plan benefits to Huttinger, but not to plaintiffs.

ALPA and TACA filed motions to dismiss or, alternatively, for summary judgment, contending that the DFR/breach of contract claim was barred by the statute of limitations and that plaintiffs had failed to state a viable ERISA claim against them. App. A, 7a.

While these motions were pending, plaintiffs made two attempts to sidestep the limitations bar to their hybrid claim. They first sought to have TACA found in contempt of the injunction issued in 1983 in *ALPA* v. *TACA* against relocation of the pilot base. This effort was rejected by the district court in *Landry* and by the judge who issued the injunction. App. A, 7a. Then, for the express purpose of avoiding the limitations bar to their labor law claim, R. 467, plaintiffs amended their complaint by repleading their RLA and ERISA claims as an alleged violation of RICO by ALPA and TACA, adding Huttinger as a defendant and trebling their damage request to nearly $100 million.

The district court dismissed the DFR/breach of contract claim as time-barred under *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983), and its progeny, because it was not filed within six months after the signing of the challenged 1985 ALPA-TACA agreements. App. E, 95a, 99a. The ERISA claim was dismissed as against TACA and ALPA because plaintiffs failed to demonstrate that these defendants were fiduciaries with respect to the matters of which plaintiffs complained. App. E, 95a-98a.

Thereafter, defendants moved to dismiss or, alternatively, for summary judgment as to the RICO claim. App. A, 8a. While those motions were pending, plaintiffs sought to resurrect their dismissed DFR/breach of

contract claim, *id.*, contending that the court had "overlooked the doctrine of equitable tolling." *Id.* The court rejected this effort as "entirely without merit," App. D, 86a, and as indicative of the "constantly evolving nature of plaintiffs' claims." R.1118. The following month, the district court dismissed the RICO claim. App. C.

2. ***Court of Appeals***

The court of appeals affirmed the grant of summary judgment to ALPA and TACA on the DFR/breach of contract claim on limitations grounds, App. A, 10a-12a, because that result was compelled by "[a] straight-forward application of *DelCostello* . . . ." App. A, 18a. The court further affirmed the trial court's determinations that there was no basis for equitably tolling the limitations period, App. A, 15a-16a, reopening the earlier ALPA-TACA litigation, App. A, 16a-17a, or permitting plaintiffs to escape the limitations bar by recharacterizing defendants' actions as an improper decertification of ALPA as bargaining representative (finding the last issue to be within the exclusive jurisdiction of the National Mediation Board). App. A, 17a.

The court affirmed dismissal of the RICO claim against TACA but reversed as to ALPA and Huttinger, App. A, 38a-62a, and reversed the grant of summary judgment on the ERISA claim. App. A, 18a-38a.

On matters not germane to the issues raised by the cross-petition, the court granted in part, and denied in part a petition for rehearing by ALPA and Huttinger. App. H.

SUMMARY OF ARGUMENT

Plaintiffs contend that the six-month statute of limitations established in *DelCostello* is inapplicable to their hybrid DFR/breach of contract claim based upon the asserted "facts of this case," cross-pet., p. 12, and *Chauffeurs, Local 391* v. *Terry*, 110 S.Ct. 1339 (1990). The cross-petition finds no support in any post-*DelCostello* decision, including *Terry*, and presents no issue meriting Supreme Court review.

REASONS WHY THE WRIT SHOULD BE DENIED

The Application by the Court Below of *DelCostello* to Plaintiffs' "Hybrid" Duty of Fair Representation/Breach of Contract Claim is Consistent with all Post-*DelCostello* Decisions and Does Not Merit Supreme Court Review

A. In *DelCostello*, this Court held that DFR/breach of contract claims were subject to the six-month limitations period for unfair labor practices ("ULPs") found in section 10(b) of the NLRA, 29 U.S.C. § 160(b). The Court selected this limitations period in light of the close "family resemblance" between ULP and DFR claims, 462 U.S. at 170, and because the § 10(b) six-month period struck the " 'proper balance between the national interests in stable bargaining relationships and finality of private settlements,' " and the interests of employees in remedying the effects of asserted unjust union conduct. *Id.* at 171 (quoting *United Parcel Serv., Inc.* v. *Mitchell*, 459 U.S. 56, 70 (1981) (Stewart, J., concurring)). In addition, application of the six-month period insured promptness and uniformity in the handling of DFR/breach of contract claims. *Id.* at 168-69, 171. The Court rejected application of differing state limitations periods which could result in "radical variation in the treatment of cases that are not significantly different" substantively, *id.* at 166 n.16, tardy challenges to union/employer conduct, *id.* at 168-69, and application of different limi-

tations periods to the two components of a hybrid action. *Id.* at 169 n.19.

B. The lower courts, *contra* cross-pet., pp. 12-14, have uniformly applied *DelCostello* to all DFR claims,[3] even where, unlike here, they have not been joined with claims against employers,[4] or have arisen, as here, under the RLA,[5] or involve allegations regarding union conduct in

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[3] The cross-petition cites no post-*DelCostello* decision of this Court, *contra* cross-pet., p. 11 (heading under "I"), or any lower court decision, which even arguably conflicts with the statute of limitations ruling below.

[4] *Zapp* v. *United Transp. Union*, 879 F.2d 1439, 1441 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 722 (1990); *Ratkosky* v. *United Transp. Union*, 843 F.2d 869, 873 (6th Cir. 1988); *Eatz* v. *DME Unit of Local 3*, 794 F.2d 29, 33 (2d Cir. 1986); *Engelhardt* v. *Consolidated Rail Corp.*, 756 F.2d 1368, 1370 (2d Cir. 1985); *Ranieri* v. *United Transp. Union*, 743 F.2d 598, 600 (7th Cir. 1984); *Erkins* v. *United Steelworkers*, 723 F.2d 837, 838 (11th Cir.), *cert. denied*, 467 U.S. 1243 (1984).

[5] App. A, 11a (decision below); *Kelly* v. *Burlington Northern R.R.*, 896 F.2d 1194, 1197 (4th Cir. 1990); *Alcorn* v. *Burlington Northern R.R.*, 878 F.2d 1105, 1108 (8th Cir. 1989); *Bailey* v. *Chesapeake & Ohio Ry.*, 852 F.2d 185, 186 (6th Cir. 1988); *Smallakoff* v. *Air Line Pilots Ass'n, Int'l*, 825 F.2d 1544, 1546 (11th Cir. 1987); *Triplett* v. *Local 308, Bhd. of Ry. Clerks*, 801 F.2d 700, 702 (4th Cir. 1986); *Brock* v. *Republic Airlines, Inc.*, 776 F.2d 523, 525-26 (5th Cir. 1985); *United Indep. Flight Officers, Inc.* v. *United Air Lines, Inc.*, 756 F.2d 1262, 1269 (7th Cir. 1985); *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239, 240 (2d Cir.), *cert. denied*, 469 U.S. 1036 (1984); *Sisco* v. *Consolidated Rail Corp.*, 732 F.2d 1188, 1192 (3d Cir. 1984); *Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358, 363-64 (10th Cir.), *cert. denied*, 469 U.S. 1087 (1984). *See also West* v. *Conrail*, 481 U.S. 35, 38 n.2 (1987) (parties agree that *DelCostello* applies to DFR claim under RLA).

Contra cross-pet., pp. 12, 15, plaintiffs have not and cannot assert a claim under section 301 of the NLRA, 29 U.S.C. § 185, as RLA employers and unions are not subject to the NLRA. 29 U.S.C. §§ 142(3), 152(2), (3). *See, e.g.*, in addition to App. A, 47a (the ruling below); *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 376 (1969); *Fechtelkotter* v. *Air Line Pilots Ass'n, Int'l*, 693 F.2d 899, 903 n.8 (9th Cir. 1982); *United States* v. *Davidoff*, 359 F. Supp. 545, 546-47 (E.D.N.Y. 1973).

negotiating agreements[6] or union misrepresentations.[7] Because a DFR suit "implicates 'those consensual processes that federal labor law is chiefly designed to promote —the formation of the . . . agreement and the private settlement of disputes under it,'" *DelCostello*, 462 U.S. at 171 (citation omitted)—no principled reason exists, and plaintiffs offer none, for applying a different limitations period for DFR actions directed at union conduct in negotiations than where union administration of an agreement is at issue.[8] *See Reed* v. *United Transp. Union*, 109 S.Ct. 621, 628 n.5 (1989) (recognizing *DelCostello* as applicable to union conduct in both negotiations and contract administration); *see also Barton Brands, Ltd.* v. *N.L.R.B.*, 529 F.2d 793, 799 (7th Cir. 1976) (unfair labor practices—to which DFR actions bear "family resemblance," *DelCostello*, 462 U.S. at 170 —reach union conduct in negotiations).[9]

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[6] *Lea* v. *Republic Airlines, Inc.*, 903 F.2d 624, 633-34 (9th Cir. 1990); *Zapp*, 879 F.2d at 1441; *Alcorn*, 878 F.2d at 1108; *Legutko* v. *Local 816, Int'l Bhd. of Teamsters*, 853 F.2d 1046, 1051 (2d Cir. 1988); *Ratkosky*, 843 F.2d at 873-74; *Bailey*, 852 F.2d at 187; *Eatz*, 794 F.2d at 33; *United Indep. Flight Officers*, 756 F.2d at 1271; *Engelhardt*, 756 F.2d at 1369; *Erkins*, 723 F.2d at 838.

[7] *E.g., Erkins*, 723 F.2d at 837; *Ray* v. *W.S. Dickey Clay Mfg. Co.*, 584 F. Supp. 1225, 1227 (D. Kan. 1984).

[8] Plaintiffs assert that *DelCostello* should not apply because plaintiffs were denied the opportunity "to bargain" or otherwise "settle" with their employer, cross-pet., p. 13, but negotiations between employers and individual employees are barred as a matter of law where, as here, there is a recognized bargaining representative. *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 62, 67-70 (1975); *Order of R.R. Tel.* v. *Railway Express Agency*, 321 U.S. 342, 347 (1944); *J.I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 335-36 (1944).

[9] While plaintiffs claim that the limitations ruling below leaves them remediless, cross-pet., pp. 11-12, the Fifth Circuit, by its treatment of the RICO claim, has permitted plaintiffs to bypass the limitations bar, and potentially to secure three times the damages they sought through their time-barred DFR claim, by simply repackaging

C. Contrary to plaintiffs' cross-petition, pp. 14-16, nothing in *Terry* addresses or "revisits," let alone purports to replace, alter or "reconsider" the holding of *DelCostello*.[10] The issue in *Terry*—whether an employee who seeks backpay in a DFR action "has a right to trial by jury," 110 S.Ct. at 1342—required the Court to "look for an analogous cause of action that existed in the 18th century." *Id.* at 1345. The Court neither stated nor suggested that the action to which this analysis led—a beneficiary's suit against a trustee—bore a closer "family resemblance" to a DFR action than an unfair labor practice charge. Because ULPs did not exist in the 18th century, such comparison could not have been made in addressing the jury trial issue in *Terry*.[11]

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it as a RICO action. This result, which directly conflicts with fundamental federal labor law policy and decisions of this Court and other circuits, is addressed in the pending petition for certiorari of ALPA and Huttinger in this action (No. 89-1925).

[10] Plaintiffs' discussion of *Terry* demonstrates the facial inconsistency in the cross-petition. In part I, plaintiffs argue not that *DelCostello* is dead law, but that it only applies to union conduct in administering a contract, which is exactly what was at issue in *Terry*. 110 S.Ct. at 1343. The thrust of Part II of the cross-petition is that *Terry* overrules *DelCostello sub silentio* in all DFR contexts.

[11] Decisions pre-dating *Terry* which upheld a right to jury trial in a DFR action considered the *DelCostello* statute of limitations analysis to have "no application to an issue of the right to trial by jury." *Terry* v. *Chauffeurs, Local 391*, 863 F.2d 334, 338 (4th Cir. 1988), *aff'd*, 110 S.Ct. 1339 (1990). *Accord Quinn* v. *Digiulian*, 739 F.2d 637, 646 (D.C. Cir. 1984); *Nicely* v. *USX*, 709 F. Supp. 646, 650-51 (W.D. Pa. 1989); *Massey* v. *Whittaker Corp.*, 661 F. Supp. 1151, 1153 n.2 (N.D. Ohio 1987); *Palmer* v. *Metro-North Commuter R.R.*, 661 F. Supp. 1178, 1179 (S.D.N.Y. 1987); *Grider* v. *C.V. Monin*, 637 F. Supp. 324, 326 (M.D. Tenn. 1986).

Since *Terry*, the lower courts have continued to apply the six-month limitations period to DFR claims. *E.g.*, *Lea*, 903 F.2d at 633-34; *Lucas* v. *Mountain States Tel. & Tel.*, 134 L.R.R.M. (BNA) 3065, 3065-66 (10th Cir. 1990) (per curiam); *Ostojic* v. *National Cleaning Co.*, 736 F. Supp. 177, 179 (N.D. Ill. 1990).

Further, regardless of the similarity between a beneficiary's action against a trustee and a DFR action, the former still "suffers from objections peculiar to the realities of labor relations and litigation," as noted in *DelCostello*, 462 U.S. at 167. For example, the Court there found a three-year malpractice limitations period unacceptably long. *Id.* at 168-69. While the Louisiana trust statute which plaintiffs seek to substitute for the *DelCostello* period has a one-year limitations period, La. Rev. Stat. Ann. § 9:2234 (West 1965 & Supp. 1990), other states apply far lengthier limitations periods to such actions.[12] Moreover, because a trust action is not analogous to a breach of contract claim against an employer, the latter would be subject to a different limitations period than applicable, under plaintiffs' proposal, to the DFR half of the hybrid action, a result *DelCostello* found unacceptable. 462 U.S. at 169 n.19. *See also Reed*, 109 S.Ct. at 627 n.4 ("important" consideration in *DelCostello* in departing from "normal practice of borrowing state statute of limitations" was that a hybrid action "yokes together interdependent claims that could only very impractically be treated as governed by different statutes of limitations").

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[12] *E.g., 10 year limitations period:* Ga. Code § 9-3-27 (Michie 1982); Miss. Code Ann. § 15-1-39 (Lawyers' Coop. 1972) (for equitable actions); *see Wholey* v. *Cal-Maine Foods, Inc.*, 530 So.2d 136, 139 (Miss. Sup. Ct. 1988); *6 years*: Minn. Stat. Ann. § 541.05 subd. 1(7) (West 1988); New York—*see Public Serv. Co.* v. *Chase Manhattan Bank*, 577 F. Supp. 92, 109 (S.D.N.Y. 1983); *Lonengard* v. *Santa Fe Indus.*, 70 N.Y.2d 262, 267, 519 N.Y.S.2d 801, 804 (1987); *3 or 4 years* (depending on factual circumstances): Cal. Prob. Code § 16460 and Leg. Committee Comment (West Supp. 1989); Cal. Proc. § 343 (West 1981); *3 years*: Colo. Rev. Stat. Ann. § 13-80-101(f) (Branford 1987); Wash. Rev. Code Ann. § 11.96.060 (West 1987); North Carolina—*see Tyson* v. *North Car. Nat'l Bank*, 305 N.C. 136, 286 S.E.2d 561, 565 (1982).

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

* * * *

National Labor Relations Act, 29 U.S.C. § 141 et seq.:

29 U.S.C. § 142. Definitions

When used in this chapter—

* * * *

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in subchapter II of this chapter.

* * * *

Subchapter II—National Labor Relations

* * * *

29 U.S.C. § 152. Definitions

When used in this subchapter—

* * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor

practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

* * * *